IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 83

UNITED STATES OF AMERICA, EX REL.,
ROGER TOUHY,

Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE PENITENTIARY, JOLIET, ILLINOIS, AND GEORGE R. McSWAIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your Petitioner, Roger Touhy, Relator in the proceedings below, prays for a Writ of Certiorari to review a decision and judgment of the United States Court of Appeals for the Seventh Circuit entered February 24, 1950, reversing a judgment order entered by the Honorable John P. Barnes on June 2, 1949 finding George R. McSwain, Special Agent, in Charge of the Chicago Office of the Federal Bureau of Investigation of the Department of Justice of the United States, guilty of contempt of court in refusing to produce certain records in response to a subpoena *duces tecum* and committing him to the custody of the Attorney General until he shall obey the order of the Court and produce the records (Rec. 159, 174).

OPINIONS BELOW.

The District Court rendered no formal opinion. Its judgment order appears in the record (Rec. 144, 145). The opinion of the United States Court of Appeals for the Seventh Circuit by Honorable J. Earl Major, Chief Judge with Honorable Philip J. Finnegan, Circuit Judge concurring and the dissenting opinion of Honorable Walter C. Lindley, Circuit Judge, appear in the Record (Rec. 159-173). The opinion is reported in 180 Fed. (2) 321.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The proceedings in the District Court were commenced by the filing of a Petition for Habeas Corpus on behalf of relator questioning the legality of an Illinois state court commitment under which he was held in the Illinois State Penitentiary at Stateville, Illinois. This petition, as subsequently amended, alleged that in the proceeding leading to petitioner's conviction and commitment, he was deprived of and denied the right to a fair trial guaranteed to him by section 1 of Amendment XIV to the Constitution of the United States, among other things in that the representatives of the State of Illinois conspired to and did bring about petitioner's conviction for an alleged crime (kidnapping for ransom) which he did not commit, by means of the procurement and production in the trial of said cause of perjured testimony as to the connection of the petitioner with the alleged crime of kidnapping one John Factor (Rec. 91, 92).

The State's Motion to Dismiss the Petition as Amended was overruled and a Writ of Habeas Corpus issued (Rec. 93, 94). Thereafter a Return (Rec. 94-97) and Traverse and Amended Traverse to the Return were filed (Rec. 104, 107, and 109). At this stage of the proceedings, a sub-

poena *duces tecum* was duly issued and served upon George R. McSwain, special agent in charge of the Chicago Office of the Federal Bureau of Investigation directing him to produce before the District Judge, certain records in his possession including, "specifically transcript, records, memoranda, and other data with respect to certain show-ups held in the offices of the Federal Bureau of Investigation, Chicago, Illinois, on or between the dates of July 19, to July 24, 1933 inclusive" (Rec. 113).

On June 1, 1949, the case having been continued to that date, George R. McSwain, who was present in Court in response to the subpoena, was requested to produce the documents therein requested (Rec. 115). At this point, the Honorable Otto Kerner, Jr., United States Attorney advised the Court that in compliance with Department of Justice Order Number 3229 and Supplement Number 2 dated June 6, 1947, the records were not produced and also apprised the Court of a letter received from the Attorney General of the United States, among other things stating (Rec. 116): "It is the Department's position that it should decline to produce the records in question."

Then followed extended colloquy in open court and chambers (Rec. 116-134) at the conclusion of which Respondent McSwain called as a witness, admitted service of the subpoena *duces tecum*, and in response to a question as to whether he had produced the documents in response to the subpoena, said that he had not produced the records and advised the Court as follows: "I must respectfully advise the Court that under instructions to me by the Attorney General, that I must respectfully decline to produce them in accordance with Department Rule No. 3229" (Rec. 135). Thereafter, respondent having persisted in his refusal to produce, the order here in question was entered, finding respondent guilty of contempt

of Court in refusing to produce the records referred to, and committing respondent to the custody of the Attorney General of the United States or his authorized representative for imprisonment until he shall obey the order of this Court and produce the records referred to in the subpoena *duces tecum* (Rec. 144, 145).

The decision of the Circuit Court of Appeals reversed the Order of commitment holding that Order Number 3229 of the Department of Justice prohibiting the production of documents was valid.*

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code (28 United States Code, Section 1254 (1)). The Judgment of the Circuit Court of Appeals herein sought to be reviewed was entered February 24, 1950.

QUESTIONS PRESENTED.

The following questions are presented by the Record in this cause:

1. Whether Department of Justice Order 3229 prohibiting disclosure of Department Records even in response to a duly served subpoena *duces tecum* is valid.

2. Whether the Attorney General of the United States may make a conclusive determination not to produce records and his employees may lawfully decline to produce the same in response to a subpoena *duces tecum*.

3. Whether the Court of Appeals for the Seventh Cir-

* The majority opinion below also held that Supplement No. 2, waived the prohibition so far as tender for personal perusal of the Court was concerned, but Supplement No. 2 is not involved in the case, first because the Attorney General does not deem it a binding regulation, and second, because in fact no actual tender for the Court's personal perusal was made in this case. (See brief, p. 24.)

cuit erred in its judgment in reversing the judgment order of the District Court adjudging respondent McSwain guilty of contempt of court and committing him to the custody of the Attorney General until he produced the records in question.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Court of Appeals for the Seventh Circuit in this case has decided important questions of Federal law which have not been but should be settled by this Court.

Constitutional Provision Involved.

Article III Sec. 1 of the Constitution of the United States pertaining to the judicial power of the United States.

Statute Involved.

5 U. S. Code 22 (R. S. Sec. 161) which provides:

> "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers and property appertaining to it."

Department of Justice Order Involved.

Order No. 3229 promulgated by the Attorney General of the United States on May 2, 1939 (set forth in full Rec. p. 119) which among other things provides:

> "Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General will appear in Court in answer thereto and respectfully decline to produce the

records specified therein, on the grounds that the disclosure of such records is prohibited by this regulation."

Supplement No. 2 to order 3229 promulgated by the Honorable Tom C. Clark, Attorney General on June 6, 1947 and set forth in full (Rec. pages 120, 121).

This case presents squarely the question whether by his own rule and determination, the Attorney General of the United States can create a binding privilege with reference to documents admittedly material to the issues before the Court, which will effectively prohibit the production of such documents when duly subpoenaed by the District Court. The question is raised in a proceeding in which violations of substantial constitutional rights are alleged and in which it appears that the requested documents directly bear upon those violations.*

There has been no decision by this Court in which production of exculpatory evidence has been excused on the basis of an *ex parte* determination by the Department of Justice that such material was confidential and privileged. Whether a Department Head or any other member of the Executive Branch of the Government can effectively create such a privilege and whether the Courts are bound by the Executive determination not to produce, are highly important questions which have not and should be finally and conclusively determined by this Court.

WHEREFORE, Petitioner appends hereto his Brief, and

* Petitioner's conviction of the crime of kidnapping for ransom for which he was sentenced to 99 years in the penitentiary was procured largely on the basis of visual identification testimony of John Factor. (*People of the State of Illinois* v. *Roger Touhy, et al.*, 361 Ill. 332, 336.) Petitioner claimed in the District Court (Rec. 129) that at the show up before the Federal Bureau of Investigation, the records pertaining to which were the subject matter of the subpoena *duces tecum* in question, said Factor was unable to identify Petitioner. The United States Attorney's statement as to the contents of the records (Rec. 129) gives credence to this claim.

prays for the allowance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to the end that this cause may be decided upon review by this Court and that the judgment of said Court of Appeals may be reversed and the Order of the District Court may be affirmed, and for such further and other relief as to this Court may seem meet.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

(1) THE OPINIONS OF THE REVIEWING COURT AND THE TRIAL COURT.

The District Judge rendered no formal opinion. The majority and dissenting opinion of the Court of Appeals for the Seventh Circuit is in the Record (Rec. pp. 159-173), and is reported in 180 Fed. 2d 321.

(2) THE JURISDICTION OF THIS COURT.

It is submitted that this is an appropriate case for review under Section 1254 (1) of the Judicial Code (28 U. S. Code, Section 1254 (1)) and Rule 38, Par. 5 (b) of this Court which falls within the condition indicated by the Rule as a ground for the exercise of the Court's discretion:

> (1) "Where a Circuit Court of Appeals has • • • decided an important question of Federal Law which has not been, but should be settled by this Court."

Whether Department of Justice Order Number 3229 prohibiting disclosure of department records is valid; and whether the Attorney General of the United States may make a conclusive determination not to produce records, and his employees may lawfully decline to produce the same in response to a subpoena *duces tecum*, are important questions of Federal Law which have not been, but should be settled by this Court.

(3) STATEMENT OF THE CASE.

A subpoena *duces tecum* requiring the production of certain records including specifically the records of show-ups held in the offices of the Federal Bureau of Investigation in Chicago, Illinois, on or between the dates of July 19 and July 24, 1933, inclusive, was duly served upon respondent George R. McSwain who was Special Agent in Charge of the Federal Bureau Investigation in Chicago, Illinois (Rec. 113, 114).

At the time this subpoena was served, petitioner's habeas corpus proceeding was pending in the District Court, a writ of habeas corpus had been issued and the cause was at issue upon the petition as amended, return, and traverse to the return as amended (Rec. 91-112). No

question was raised in the District Court as to the records being in the possession and custody of respondent McSwain. No question was raised as to the validity of the service. When called upon to produce the records, Respondent McSwain flatly and unqualifiedly refused production basing his refusal upon instructions to him by the Attorney General in accordance with Department Rule 3229 (Rec. 135).

There was some colloquy between the United States Attorney and counsel which resulted in differing interpretation as to the effect and applicability of Supplement Number 2 to Order 3229 of the Department of Justice (Rec. 114-134). This is fully discussed in Point IV of our Argument. Excepting for this point (which we believe, in any event, is not material since the Department of Justice does not regard Supplement Number 2 as a binding regulation) the sole question presented to the District Court and to the Court of Appeals was whether on the undisputed facts, Respondent McSwain in reliance upon Order 3229 and the instructions from the Attorney General could properly refuse to produce the records when so directed by the Court.

(4) SPECIFICATIONS OF ERRORS.

Petitioner submits that the Court of Appeals for the Seventh Circuit erred in the following respects:

'(A) In holding that Department of Justice Order 3229 was valid;

(B) In reversing the Judgment Order of the District Court committing respondent McSwain to the custody of the Attorney General until the records in question shall have been produced.

SUMMARY OF ARGUMENT.

I.

Department of Justice Order Number 3229, and the Action of That Department Under It in This Case Constituted an Unwarranted Invasion of the Judicial Functions of the Courts.

Dissenting opinion of Justice Brandeis in *Myers* v. *United States*, 272 U. S. 52, 293.

Story Commentaries on the Constitution of the United States (1833) Vol. II, pages 2, 6, 23.

II.

This Court Has Refused to Accord Departmental Immunity to Executive Officials and Has Recognized the Impropriety of Denying Access to Exculpatory Material on the Mere Assertion of Executive Privilege.

Marbury v. *Madison*, 1 Dallas 267 at p. 268, 1 Cranch, 137.

United States v. *Aaron Burr*, 25 Fed. Cases 1-207, Fed. Cases 14692 (d), 14693, 14694.

8 Wigmore on Evidence, 3rd Ed., Sections 2378A, 2379.

III.

The Decision of This Court in Boske v. Comingore, 177 U. S. 459 Does Not Sustain the Validity of Order 3229 in the Light of the Encroachment Upon Judicial Powers Here Involved.

Boske v. *Comingore*, 177 U. S. 459 (Distinguished).

Revised Statutes, Sec. 161, 5 U. S. Code 22.

IV.

Supplement No. 2 to Order 3229 Providing, Among Other Things for a Tender to the Court Is Not a Binding Regulation and, Moreover, Is Not Applicable on the Facts of the Case.

United States of America v. *Cotton Valley Operators, et al.*, No. 490, October 1949 term United States Supreme Court.

ARGUMENT.

I.

Department of Justice Order Number 3229, and the Action of That Department Under It in This Case Constituted an Unwarranted Invasion of the Judicial Functions of the Courts.

We respectfully submit, that Order No. 3229, as utilized by the Department of Justice in this case, represents an encroachment upon and invasion of the essential judicial power, which if permitted to stand, constitutes a threat to the separation of powers—executive, legislative, and judicial—which forms the basic policy underlying the framework of our government.

If the executive may say "thou shall not" to the courts with respect to the enforcement of the court's own processes in an inquiry properly within the Court's jurisdiction, then we no longer have an independent judiciary, the establishment of which was a *sine qua non* in the minds of the founders of our Republic. This is particularly true since, of the three, as has been pointed out, the judiciary is the weakest and most vulnerable of the branches of government and the challenge to liberty which this encroachment represents, may not be taken lightly.

We respectfully call to the attention of the Court and ask that it be carefully considered, the following commentary by Mr. Justice Story, in his Commentaries on the Constitution of the United States (1833) (Vol. II, p. 23):

> "Indeed, the judiciary is naturally, and almost necessarily (as has been already said) the weakest department (citing Montesquieu, Spirit of Laws, B 11, ch. 6). It can have no means of influence by patronage. Its

powers can never be wielded for itself. It has no command over the purse or the sword of the nation. It can neither levy taxes, nor appropriate money, nor command armies, or appoint to offices. It is never brought into contact with the people by the constant appeals and solicitations and private intercourse, which belong to all the other departments of government. It is seen only in controversies, or in trials and punishments. Its rigid justice and impartiality give it no claims to favour however they may to respect. It stands solitary and unsupported, except by that portion of public opinion which is interested only in the strict administration of justice. * * * It would seem, therefore, that some additional guards would, under such circumstances, be necessary to protect this department from the absolute dominion of the others. Yet rarely have any such guards been applied; and every attempt to introduce them has been resisted with a pertinacity, which demonstrates how slow popular leaders are to introduce checks on their own power; and how slow the people are to believe, that the judiciary is the real bulwark of their liberties."

If the Courts will not protect their own power, certainly no one is going to do it for them and the people, where individual liberty is at stake, are the ones bound to suffer.

Nothing is more fundamentally a part of the judicial power, than the right of a Court to compel obedience to its own process, orders and decrees. This is one of the basic and inherent attributes of a Court. It is equally clear that the determination whether in any given case reasons of public interest require non-disclosure of information, is and must be a judicial determination. Order No. 3229, as acted upon by the Department of Justice in this case, and as construed by the majority of the Court of Appeals in the decision sought to be reviewed, prohibits the Court from exercising its judicial powers and from making the determination involved.

The encroachment directly does violence to the basic constitutional principle of separation of powers. Mr. Justice Story, in his Commentaries on the Constitution of the United States, thus states the principle (Vol. II, p. 2):

> "In the establishment of a free government, the division of the three great powers of government, the executive, the legislative, and the judicial, among different functionaries, has been a favorite policy with patriots and statesmen. It has by many been deemed a maxim of vital importance, and that these powers should forever be kept separate and distinct. * * *
>
> "Montesquieu seems to have been the first, who, with a truly philosophical eye, surveyed the political truth involved in this maxim, in its full extent, and gave to it a paramount importance and value. As it is tacitly assumed, as a fundamental basis in the constitution of the United States, in the distribution of its powers, it may be worth inquiry, what is the true nature, object and extent of the maxim and of the reasoning by which it is supported. The remarks of Montesquieu on the subject will be found in a professed commentary upon the constitution of England (Montesquieu, B. 11 ch. 6). 'When,' says he, 'the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty, because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty if the judiciary power be not separated from the legislative and executive'."

Story also quotes from The Federalist, No. 47, as follows (p. 6):

> "And the Federalist has, with equal point and brevity, remarked that the accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective may be justly pronounced the very definition of tyranny."

Mr. Justice Brandeis, in the course of his dissenting opinion in *Myers* v. *United States*, 272 U. S. 52, said this with respect to the doctrine of the separation of powers (p. 293):

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

II.

This Court Has Refused to Accord Departmental Immunity to Executive Officials and Has Recgonized the Impropriety of Denying Access to Exculpatory Material on the Mere Assertion of Executive Privilege.

The power of this Court to require employees of the Executive Branch to comply with its processes was squarely before the Court in *Marbury* v. *Madison*, 1 Cranch 137 (1803). This Court's decision on that branch of the case leaves no room to doubt that this Court and the Federal Courts generally do have the power to determine whether in any given case an executive privilege exists and to enforce compliance upon the basis of its determination. The issue arose upon the objection of the Attorney General (formerly Acting Secretary of State) and of certain clerks to testifying in the case. The manner in which this Court (before whom the matter was pending on an original petition for Mandamus) handled the situation is thus summarized (1 Dallas, 3rd Edition (1854), at p. 268):

> "Mr. Jacob Wagner and Mr. Daniel Brent, who had been summoned to attend the Court and were required

to give evidence, objected to be sworn, alleging that they were clerks in the Department of State, and not bound to disclose any facts relating to the business or transactions of the office.

"The Court ordered the witnesses to be sworn and their answers taken in writing, but informed them that when the questions were asked they might state their objection to answering each particular question, if they had any.

"Mr. Lincoln, who had been the Acting Secretary of State, when the circumstances stated in the affidavit occurred, was called upon to give testimony. He objected to answering. The questions were put in writing.

"The Court said there was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it, and if he thought that anything was commanded to him confidentially, he was not bound to disclose, nor was he obliged to state anything that would criminate himself."

After the court's ruling, Mr. Lincoln took the stand and as appears from the report of the proceedings in 1 Cranch 137, at p. 144 answered all questions put to him, except one in connection with which he professed lack of knowledge.

A situation similar to that at bar was also before Chief Justice Marshall, sitting as a Circuit Judge, in *United States* v. *Aaron Burr*, 25 Fed. Cases 1-207, Fed. cases 14692d, 14693, 14694. There counsel for the defendant subpoenaed certain correspondence between President Jefferson and General Wilkinson which was in the President's possession. Eventually the correspondence was produced with certain material deemed by the President to be privileged deleted. Apparently counsel for the defendant did not persist with respect to the deleted portions. Of interest are the Chief Justice's remarks in the course of the proceedings (25 Fed. Cases at p. 192):

"Yet it is a very serious thing, if such letter should

contain any information material to the defence, to withhold from the accused the power of making use of it. It is a very serious thing to proceed to trial under such circumstances. I cannot precisely lay down any general rule for such a case. Perhaps the court ought to consider the reasons which would induce the president to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defence. The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused. But on objections being made by the president to the production of a paper, the court would not proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case. On the present occasion the court would willingly hear further testimony on the materiality of the paper required, but that is not offered.

"In no case of this kind would a court be required to proceed against the president as against an ordinary individual. The objections to such a course are so strong and so obvious, that all must acknowledge them. But to induce the court to take any definite and decisive step with respect to the prosecution, founded on the refusal of the president to exhibit a paper, for reasons stated by himself, the materiality of that paper ought to be shown. In this case, however, the president has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge. It is their operation on his mind, not on the mind of others, which must be respected by the Court. They must therefore be approved by himself, and not be the mere suggestions of another for him. It does not even appear to the court that the president does object to the production of any part of this letter. The objection,

and the reasons in support of the objection, proceed from the attorney himself, and are not understood to emanate from the president. He submits it to the discretion of the attorney. Of course, it is to be understood that he has not objections to the production of the whole, if the attorney has not. Had the president, when he transmitted it, subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them, all proper respect would have been paid to it; but he has made no such reservation. As to the use to be made of the letter, it is impossible that either the court or the attorney can know in what manner it is intended to be used. The declarations therefore made upon that subject can have no weight. Neither can any argument on its materiality or immateriality drawn from the supposed contents of the parts in question. The only ground laid for the court to act upon is the affidavit of the accused; and from that the court is induced to order that the paper be produced, or the cause be continued. In regard to the secrecy of these parts which it is stated are improper to give out to the world, the court will make any order that may be necessary.

"I do not think that the accused ought to be prohibited from seeing the letter; but, if it should be thought proper, I will order that no copy of it be taken for public exhibition, and that no use shall be made of it but what is necessarily attached to the case. After the accused has seen it, it will yet be a question whether it shall go to the jury or not. That question cannot be decided now, because the court cannot say whether those particular passages are of the nature which are specified. All that the court can do is to order that no copy shall be taken; and if it is necessary to debate it in public, those who take notes may be directed not to insert any part of the arguments on that subject. I believe, myself, that a great deal of the suspicion which has been excited will be diminished by the exhibition of this paper."

It is apparent from the tenor of Chief Justice Marshall's remarks, that although the Court was obviously reluctant to force the issue to its ultimate conclusion, even with respect to the Chief Executive the Court unquestionably had the power to do so. It is also significant, we believe, that Chief Justice Marshall quite apparently felt that regardless of what might have been done with respect to making the letter a matter of public record, the defendant had a right to see it.

Wigmore on Evidence, 3rd Edition, Section 2379 (p. 799) strongly asserts that the Court must not abdicate its inherent function of determining the facts upon which the admissibility of evidence depends. The basic reasons for this position were so well stated in the argument of Mr. Botts in the *Burr* case (as set forth in Wigmore (3rd Edition), Vol. VIII, Sec. 2378a, p. 796n) that we here repeat them:

> "I can never express, in terms sufficiently strong, the detestation and abhorrence which every American should feel towards a system of state secrecy. • • • In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of the United States have a right to know every public act, everything that is done in a public way by their public functionaries. • • •
>
> "I will again predict that if a secret inquisitional tribunal be established by your decision now • • • if you determine that we be deprived of the benefit of important written or oral evidence by the introduction of this state secrecy, you lay, without intending it, the foundation for a system of oppression. If these things be established, to go down to posterity as precedents, the inevitable consequences will be that, whenever any man in the United States becomes an object of the vengeance or jealousy of those in power, he may easily be ruined. A wicked executive power will have

nothing to do to effect this destruction but to foment divisions in this country, to encourage and excite accusations by its officers, to deny the use of all public documents that may tend to the justification of the accused, or to render the attainment of exculpatory evidence dependent on the arbitrary whim of its prosecuting officers, and he will be condemned to sink without the smallest effectual resistance."

III.

The Decision of This Court in Boske v. Comingore, 177 U. S. 459 Does Not Sustain the Validity of Order 3229 in the Light of the Encroachment Upon Judicial Powers Here Involved.

The majority opinion in the Court below felt that the decision of this Court in the case of *Boske* v. *Comingore*, 177 U. S. 459, was conclusive with respect to the validity of Order 3229. We respectfully submit that the facts in the *Boske* case and the issues presented to this Court in that case do not justify such a conclusion.

In the *Boske* case this Court had before it the validity of Treasury Department Rule X and held that the regulation prohibiting disclosure of tax data obtained by Collectors of Internal Revenue, was authorized by Section 161 of the Revised Statutes (5 U. S. Code 22), the same Statute relied upon to sustain the validity of Order 3229. That Statute is a "Housekeeping Statute". It authorizes the heads of the various departments to prescribe regulations *not inconsistent with law for the custody, use and preservation of the records, papers and property pertaining to his department.* This Court held that under the circumstances existing in the *Boske* case the Treasury Department regulation was not inconsistent with law within the meaning of the Statute.

In the *Boske* case an employee of the United States had been adjudicated in contempt of a State Court for his refusal to produce tax records sought by State taxing bodies to aid them in the collection of State taxes. He was released upon a writ of habeas corpus issued by the United States District Court and the case was heard in this Court on appeal from the order discharging the collector from custody.

We concede that within their spheres the State Courts are every bit as much a part of the judicial framework of our government as are the United States District Courts, but in considering what issues were actually decided in the *Boske* case it cannot escape attention that the matter was presented to this Court in an atmosphere colored by protection of Federal Government officials against action at the behest of state taxing authorities and that no problem of executive versus judicial power and authority was present in the case or in the minds of the Court or parties at the time it was presented.

Certainly this Court, in the *Boske* case did not purport to lay down any definitive rule of law prescribing the respective spheres of action of the Courts and the Executive Department. In considering the breadth to be accorded the *Boske* decision, the effect of the dangers to the revenue collecting facilities of the United States in the situation there present cannot be overlooked. If data furnished to United States tax collectors were immediately available to all state taxing agencies, a reluctance to furnish that data was certainly to be anticipated. No such policy element is present in this case.

Boske v. *Comingore*, 177 U. S. 459, did not decide that a person whose liberty was either in jeopardy or restrained might be deprived of exculpatory evidence at the will of the Department of Justice. Apparently for this reason the

great bulk of the recently decided cases in the lower Courts, by use of the fiction of waiver or otherwise have made such evidence available, despite the government's claim of privilege. A number of these are collected in a foot note.*

Whether the Department of Justice has any such absolute privilege to refuse to divulge records containing exculpatory material in a proceeding involving alleged violations of constitutional rights, is the question presented in this case, and is, we respectfully submit, an important question which has not been and should be decided by this Court.

IV.

Supplement No. 2 to Order 3229 Providing, Among Other Things for a Tender to the Court Is Not a Binding Regulation and, Moreover, Is Not Applicable on the Facts of the Case.

The Court of Appeals in its decision in this case, after holding that Order 3229 was valid and created a privilege of non-disclosure, proceeded to hold that Supplement Number 2 to this Order waived this privilege insofar as a tender of records subpoenaed to the Court for the

* *Crosby* v. *Pacific S. S. Line*, 133 Fed. (2) 470 (1943) (C. C. A. 9th); *United States* v. *Grayson*, 166 Fed. (2) 863 (1948) (C. C. A. 2nd); *United States ex rel. Schlueter* v. *Watkins*, 67 Fed. Supp. 556 (1943) (D. C. N. Y.); *Sorrentino* v. *United States*, 163 Fed. (2) 627 (1947) (C. C. A. 9th); *Bankline* v. *United States*, 163 Fed. (2) 133 (1947) (C. C. A. 2d); *United States* v. *Beekman*, 155 Fed. (2) 580 (1946) (C. C. A. 2d); *United States* v. *Krulewitch*, 145 Fed. (2) 76 (1945) (C. C. A. 2d); *United States* v. *Cohen*, 145 Fed. (2) 82 (1945) (C. C. A. 2d); *United States* v. *Andolschek*, 142 Fed. (2) 503 (1944) (C. C. A. 2nd); *United States* v. *General Motors Corp.* (D. C. Ill., 1942), 2 F. R. D. 528; *Bowles* v. *Ackerman* (D. C. N. Y., 1945), 4 F. R. D. 260; *O'Neill* v. *United States* (D. C. Pa., 1948), 79 Fed. Supp. 827, 830; *Zimmerman* v. *Poindexter* (D. C. Hawaii, 1947), 74 Fed. Supp. 933, 936.

Court's personal perusal was concerned. The Court of Appeals then went on to hold that on the facts of this case, since the Court had stated it would not look at the documents in question without the assistance of counsel, the waiver created by Supplement Number 2 did not apply.

We believe the Court of Appeals erroneously interpreted the occurrences in the Trial Court on this question of tender, but entirely aside from this, we wish to point out that it is the official position of the Department of Justice that Supplement Number 2 is not, in any event, a binding regulation and is merely for the private instruction of United States attorneys. A full statement of the Department's position with respect to Supplement Number 2 appears on page 5 of the Reply Brief for the United States in the case of *United States of America* v. *Cotton Valley Operators, et al.*, No. 490, in the October 1949 term of this Court as follows:

> "Supplement No. 2, as well as the other supplements or circulars issued by the Department of Justice in connection with Order No. 3229, have no relevancy to this case. The supplement is solely for the private instruction of United States attorneys. It is not a public regulation. Its purpose is to inform United States attorneys of procedure to be followed in the absence of specific instruction from the Attorney General. In no sense does it bind or obligate the Attorney General. * * * That supplement does not, by its literal terms or in legal effect, limit the Attorney General's right to appear and claim the privilege against disclosure."

The occurrences on the basis of which the Court of Appeals held no waiver of the absolute privilege conferred by Order 3229 existed are the following:

In the course of the colloquy at the time production of the records was requested, the United States attorney stated (Rec. 123):

"It is a matter of discretion with the Court to ascertain whether or not they are material and I will provide them for the Court's personal perusal". To this the Court replied: "What can I do in looking at them without counsel looking at them? He cannot make a record on that." Whereupon the United States Attorney stated: "Well, I am standing on my instructions here that I cannot produce them on the orders of the Attorney General."

Shortly thereafter the Court stated (Rec. 125): "I cannot believe that public security is going to be adversely affected by their seeing those papers."

At this point, the United States Attorney stated: "May I produce these documents before Your Honor in Chambers with counsel present and I shall read them."

The matter was then continued until two o'clock and at that time the United States Attorney appeared in chambers without the documents and when reminded by the Court of his offer to submit the documents in chambers with counsel present, the United States Attorney stated (Rec. 134): "I did not intend actually to bring the reports in because I was still under the orders of the Department."

This was followed by calling agent McSwain to the stand in open Court, at which time he made an unqualified refusal to produce based on Order 3229 (Rec. 135).

On these facts we respectfully submit there was no such tender of the material to the Court for its personal perusal as the majority opinion in the Court of Appeals indicates, and for this reason, Supplement Number 2 which contemplates such a tender, is not here involved.

We therefore respectfully submit that this Court should grant the Writ of Certiorari here prayed for and reverse the judgment of the United States Court of Appeals for the Seventh Circuit and affirm the judgment order of the United States District Court.

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